



VOSH PROGRAM DIRECTIVE: 09-003E

ISSUED: October 1, 2006

SUBJECT: Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health Program

A. Purpose.

This directive transmits to field personnel the above-referenced Administrative Regulations Manual (**CHANGE I**). In **CHANGE II**, amendments are made to the ARM to correct a typographical error and to reflect revised statutory language concerning the time limit for employers to report work-related incidents resulting in a fatality or in the in-patient hospitalization of at least 3 individuals. **CHANGE III** reflects the requirements from the Abatement Verification regulation that employers provide specific documentation of abatement, including detailed evidence of the corrective actions that have been taken to abate hazards for which citations were issued. **CHANGE IV** removes outdated references to the Administrative Process Act (APA) which appear in the Administrative Regulations Manual and replaces those outdated references with renumbered references reflecting the statutory revisions to the APA. **CHANGE V** codifies in regulation the agency's longstanding multi-employer worksite policy for citation issuance and the multi-employer worksite defense and requires the use of manufacturer's guidelines for machinery, equipment, vehicles, materials and tools where no overriding specific regulations exist.

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

B. Scope.

This directive applies to all VOSH personnel.

C. References.

CHANGE II: Not Applicable.

CHANGE III: 62 FR 15324 (March 31, 1997); OSHA Instruction STP 2.23 (June 4, 1997).

CHANGE IV: Not Applicable.

CHANGE V: Not Applicable.

D. Cancellation.

VOSH Program Directive 02-102 (February 15, 2000); and
VOSH Program Directive 09-003D (April 1, 2003).

E. Action.

Directors and Managers shall assure that VOSH personnel are aware of and comply with the rules, requirements and procedures of the ARM for the VOSH Program, as amended.

F. Effective Dates.

CHANGE I: June 30, 1994.
CHANGE II: August 1, 1995.
CHANGE III: December 15, 1997.
CHANGE IV: March 1, 2003.
CHANGE V: September 21, 2006.

G. Expiration Date.

Not Applicable.

H. Background.

CHANGE I: The purpose of the Administrative Regulations Manual (ARM) is to provide an operational framework of rules and procedures for the administration of the Virginia Occupational Safety and Health (VOSH) program.

The major objective of this revised ARM was to provide employers, employees, the public, VOSH employees, and other parties interested in the administrative rules governing the VOSH program with a simplified document in a more concise format to aid in the understanding of the general administrative provisions and specific related procedures of the program.

The Safety and Health Codes Board adopted this revised Administrative Regulation for the VOSH Program at its meeting on April 25, 1994. This regulation became effective on June 30, 1994.

CHANGE II: Two amendments were made in the document. The purpose of the first amendment, which appears in paragraph 4 of what was then § 2.3, is to delete a typographical error that inadvertently resulted during the 1994 revision.

The second amendment, affecting what was then § 2.4. A. and B., was made pursuant to Chapter 373 of the 1995 Virginia Acts of Assembly which amends Chapter 40.1-51.1, dealing with duties of employers. This statutory change was initiated by the Department to comply with a similar regulatory change by federal OSHA published at 59 FR 15594 on April 1, 1994.

The Safety and Health Codes Board adopted this revised Administrative Regulation for the VOSH Program at its meeting on April 17, 1995. This regulation became effective on August 1, 1995.

CHANGE III: Historically, employer compliance with requests by both federal OSHA nationally and VOSH to provide evidence of abatement has been administrative, rather than regulatory in nature and follow-up inspections were often necessary to determine whether abatement had occurred.

A 1991 General Accounting Office (GAO) Report to Congress assessed the adequacy of federal OSHA's policies and procedures for ensuring abatement of cited hazards. In its report, GAO determined that OSHA's existing policies had limitations that interfered with OSHA's ability to identify those employers who have failed to abate the hazards for which they had been cited. This was especially true for construction employers who could move cited hazardous equipment to another location where it could continue to pose a risk to an additional group of employees who would not be aware of the OSHA citation.

At its September 29, 1997 meeting, the Safety and Health Codes Board adopted revisions to the ARM which became effective on December 15, 1997.

CHANGE IV: Chapter 844 of the 2001 session of the General Assembly amended the Code of Virginia by recodifying Titles 2.1 and 9. As a result of this action, which became effective on October 1, 2001, the code sections in the Administrative Process Act were renumbered.

On December 2, 2002, the Safety and Health Codes Board adopted this revision of the ARM, with an effective date of March 1, 2003.

CHANGE V: Amendments were necessary to comply with changes to statutory law or to address procedural or other administrative changes that had occurred since the Administrative Regulations were revised.

At its March 7, 2006 meeting, the Safety and Health Codes Board adopted this revision of the ARM. The ARM has an effective date of September 21, 2006.

I. Summary.

CHANGE I: This was the first complete revision of the Administrative Regulations Manual (ARM) which was initially adopted in 1986. This revision contained substantive changes primarily in the areas of additional definition of terms and clarification of the 48-hour accident reporting requirements of employers. To respond to the requests to the Department for information by subpoena, new language was added which allowed the Commissioner to restrict VOSH employees from being deposed, testifying or otherwise participating in third-party lawsuits in which the Department had no genuine interest. This revision also clarified the VOSH program's response to certain federal judicial action, such as vacation of §1910.1000 permissible exposure limits (PEL). The revised ARM codified the employee misconduct defense and provided that the defense does not apply to supervisory personnel.

This revision also simplified the regulation by omitting requirements already stipulated in Title 40.1 of the Code of Virginia in those cases where no further regulatory language was necessary to carry out that mandate.

CHANGE II: This first amendment involves removing the unnecessary language, "subsection B of," which appears in paragraph 4 of § 2.3., Notification and Posting Requirements. This typographical error was made when the Administrative Regulation for the Virginia Occupational Safety and Health Program was revised in 1994.

The second amendment, which appears in § 2.4. A. and B., reduces from 48 hours to 8 hours the time limit for employers to report any work-related incident resulting in a fatality or the hospitalization of at least 3, rather than 5, individuals. In cases where an employer does not immediately learn of a reportable incident, the employer would report within 8 hours, rather than 48 hours, of learning of such incident. This amendment also requires an employer to report within 8 hours, rather than 48 hours, after learning of the death of a worker who dies within 30 days of an incident; and provides specifics for information requirements and reporting methods.

CHANGE III: If abatement occurs during or immediately after the inspection that identified the violation(s), the employer would not be required to submit an abatement certification letter to VOSH. If the violation(s) is an other-than-serious violation, or serious violation that does not require additional documentation, the employer is required to certify abatement using a simple one page form letter or equivalent. This simple form describing the completed abatement actions will meet the requirements for most violations. The employer certification that abatement is complete must include, among other things, a statement that affected employees and their representatives have been informed of the abatement (1903.19(c)(3)). In cases involving the most serious violations, additional documentation will be required.

Willful and repeat violations will require certification and documentation of abatement. Serious violations will require abatement documentation only if designated by VOSH. OSHA estimates that between 84 to 90 percent of all violations will require only a simple letter verification of abatement.

Abatement plans may be required by VOSH if the period allowed for abatement exceeds 90 days. Such plans, when required, will generally be simple one page documents. Progress reports may also be required by VOSH to note the status of abatement efforts and may require only a simple sentence description of the interim action taken.

For movable equipment, such as construction equipment, that has been cited as a serious hazard, the regulation would allow employers to either post a copy of the citation on the cited equipment or attach a warning tag supplied by VOSH, or devised by the employer to the equipment to alert affected employees to the presence of the hazard.

VOSH must indicate cited items on the citation for which documentation and/or an abatement plan is required and the cited items for which certification is not required.

CHANGE IV: These amendments to the Administrative Regulation for the Virginia Occupational Safety and Health Program will replace outdated references to Title 9 of the Administrative Process Act with the current references.

CHANGE V: This amendment to the Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program further clarifies and specifies the intent of definitions or other procedural actions listed in the regulation. It adds omitted statutory references applicable to the regulation and

corrects omissions in listing of documents covered under notification and posting requirements. It clarifies the disclosability of file documents prior to the issuance of a final order. It further specifies the eligibility of a person to file a complaint, to modify the classification of complaints to correspond with the parallel procedures of federal OSHA and the response to such complaints. This amendment requires employers to comply with manufacturer's specifications, requirements and limitations on all machinery, equipment, vehicles, materials and tools where not superseded by more stringent VOSH regulations. This amendment clarifies the meaning of the term "agricultural operations." It also further clarifies the existing timetable for issuing citations and proposed penalties. Additionally, the amendment codifies in regulation the multi-employer worksite policy for citation issuance; and it removes the direct involvement of the Commissioner of Labor and Industry in the determination of the extension of abatement times.

Details of CHANGE V Amendments

- A. Amended certain definitions contained in §10, Definitions, including "Abatement period," "Commissioner," "Commissioner of Labor and Industry," "Person," and "Public employer." The amendments are primarily for clarification purposes and do not involve any substantive changes.
- B. Amended §§20, 40 and 130 to correct subparagraph numbering, and correct spelling error in word "tunneling" in §130. The amendment does not involve any substantive change to VOSH policy or procedure.
- C. Amended §30.C., Applicability to Public Employers, to apply Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc., to public sector employers (any person sworn to give testimony who willfully refuses, or any person to whom interrogatories have been sent who refuses to answer, or any person who obstructs an inspection or investigation can be subject to conviction for a misdemeanor and a fine not exceeding \$100.00 nor less than \$25.00, or imprisonment in jail not exceeding 90 days). *(NOTE: The criminal provision contained in Va. Code §40.1-51.4:2, Penalty for making false statements, etc., which carries a fine of not more than \$10,000.00 or imprisonment for not more than six months or by both, already applies to public employers by operation of the VOSH ARM §30.C.). ;*
- D. Amended §30.E., Applicability to Public Employers, to apply Va. Code §§40.1-49.9, Issuance of warrant; 40.1-49.10, Duration of warrant; 40.1-49.11, Conduct of inspection, testing, or collection of samples for analysis; 40.1-49.12, Review by courts, to political subdivision employers in the Commonwealth. Under the previous ARM, the VOSH program had no enforcement tool that would allow it to compel a political subdivision to allow the Department to conduct an enforcement inspection, were the political subdivision to refuse its consent to allow an inspection. With regard to state agencies, the Commissioner can pursue cooperation through consulting with the appropriate Cabinet Secretaries and, if necessary, the Governor's Office. At the political subdivision level, while requests can be made to local government officials for cooperation, should the local entity still refuse, the Commissioner has very limited ability to force cooperation. The amendment allows the Commissioner to pursue an administrative search warrant through the local court system
- E. Amended §40, Notification and Posting Requirements, to clarify that notices of contests shall be delivered by the employer to any authorized employee representative.
- F. Amended §80, Access to Employee Medical and Exposure Records, to delete the obsolete reference to "Va. Code §2.1-377 to -386" and change it to the re-designated 2.2-3800 to -3809. The amendment is a housekeeping measure and does not involve any substantive change. The Virginia Privacy Protection Act was repealed by the General Assembly and re-designated as the Government Data Collection and Dissemination Practices Act.
- G. Amended §90.D., Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, to permit the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the

employer under a discovery request (request for production), or to a third party in response to a *subpoena duces tecum* for contested case file documents (*Note: This provision would not apply in cases where documents from an active investigation are released in response to a subpoena duces tecum from a third party*). The purpose of this request is primarily to assist family members of accident victims to obtain documents from VOSH inspection files in a more timely fashion. The previous ARM did not allow release of documents until the case was closed, which can stretch out to a period of years when the case is in litigation. However, once a contested case file has been released to the employer through a discovery request or a litigant in a third-party legal action, any benefit to the Department's litigation strategy has disappeared, and there is no purpose served in maintaining confidentiality.

- H. Amended §§100A., E., and F., Complaints, to eliminate obsolete references to “formal” (signed employee complaints) and “nonformal” complaints (unsigned employee complaints, complaints filed by former employees, complaints filed by authorized representatives and complaints by persons other than employees) and substitute language similar to that in the VOSH Field Operations Manual (and federal OSHA requirements) which describes complaints as those that are either inspected (i.e., the employer receives an onsite inspection), or investigated (the employer is contacted by phone or fax). The amendment also lists in §100.F.1 through F.3., the types of complaints that will normally result in an inspection or investigation:

1. Onsite inspections will normally be conducted in response to complaints alleging the following:
 - a. The complaint was reduced to writing, is signed by a current employee or employee representative, and states the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard has occurred.
 - b. Imminent danger hazard;
 - c. Serious hazard, which in the discretion of the commissioner requires an onsite inspection;
 - d. Permanently disabling injury or illness related to a hazard potentially still in existence;
 - e. The establishment has a significant history of non-compliance with VOSH laws and standards;
 - f. The complaint identifies an establishment or an alleged hazard covered by a local or national emphasis inspection program;
 - g. A request from a VOSH/OSHA discrimination investigator to conduct an inspection in response to a complaint initially filed with the investigator;
 - h. The employer fails to provide an adequate response to a VOSH investigation contact, or the complainant provides evidence that the employer's response is false, incorrect, incomplete or does not adequately address the hazard.
2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in §100.F.1 above.

3. The Commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that don't meet the criteria listed in §100.F.1 above; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in §100.F.1. above.

The amendment does not involve any substantive change to VOSH policy or procedure.

- I. Amended Part III, Occupational Safety and Health Standards, §§120 (General Industry Standards), 130 (Construction Industry Standards) 140 (Agriculture Standards) and 150 (Maritime Standards), to add regulatory authority for the VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment. Use of any non-compliant item is prohibited: "The use of the machinery, vehicle, tool, material or equipment which is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable, or be physically removed from its place of use or operation." These provisions apply unless specifically superseded by a more stringent corresponding requirement in Parts 1910, 1926, 1928, 1915, 1917 and 1919. The new provisions also supersede any less stringent requirements currently contained in Parts 1910, 1926, 1928, 1915, 1917 and 1919.

With the exception of a few construction and general industry standards which require employers to comply with manufacturer specifications and limitations (e.g., 1910.254(d)(6) - arc welding; 1910.266(f)(1)(iii), (f)(2)(iv) and (f)(2)(vi) – logging machinery; 1926.552(a) - material hoists, personnel hoists and elevators; 1926.554(a)(6) overhead hoists; etc.), when VOSH investigates an accident and finds that the cause of the accident was primarily due to misuse or improper operation of a piece of machinery, vehicle, tool, material or equipment, the only enforcement tool available is the use of §40.1-51.1.A., which is more commonly referred to as the "general duty clause." That section provides in part that:

"It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees...."

As is evident from the wording of the statute, it does not specifically mention manufacturer's specifications and limitations, nor does it contain a requirement to remove the item from service until any problems are fixed. The statute has also been interpreted in case law to only apply to "serious" violations (i.e., those that would cause "death or serious physical harm"). The purpose of the amendment is to clarify an employer's current responsibility under the "general duty clause" to comply with manufacturer's specifications and limitations, as well as allow the use of the new provision to address "other-than-serious" hazards before they can become serious in nature. The amendment also provides an additional enforcement tool for the Commissioner to prevent the recurrence of accidents by assuring that machinery, vehicles, tools, materials and equipment which are not functioning properly, are removed from service until the condition is corrected.

[NOTE: During the period January, 2004 through June, 2005, the VOSH Program investigated at least eight fatal and one non-fatal catastrophic event where the cause of the accident could be directly attributed to failure to follow manufacturer's specifications and limitations.]

- J. Amended §140, Agricultural standards, to clarify "Agricultural Operations." Current VOSH standards for Agriculture use the term "agricultural operations" but do not define the term. Section 140 now provides"

"For the purposes of applicability of such Part 1928 and Part 1910 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in § 130.A. of this regulation; nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture."

The purpose of the amendment is to provide further guidance to VOSH personnel, employers and employees concerning the applicability of, and in certain cases the non-applicability, of the agricultural standards contained in Part 1928. The amendment reflects current VOSH enforcement policy and is based in part on a definition of "farming operation" contained in Federal OSHA Instruction CPL 2-0.51J:

A **"farming operation"** means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 (Farm Management Services).

However, the amendment further clarifies that operations that meet the definition of construction work contained in §130 shall not be considered to be included within the definition of "agricultural operations," nor shall any operations which are substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

- K. Amended §150, Maritime Standards, to include references to 29 C.F.R. 1918 and 1919 standards (Longshoring-public sector only, and Gear Certification-public sector only, respectively).
- L. Amended §260.A., Issuance of Citation and Proposed Penalty, guidance on how to apply the requirement in Va. Code §40.1-49.4.A.3. which provides that "No citation may be issued under

this section after the expiration of six months following the occurrence of any alleged violation.”
The amendment would provide that:

- a. §260.A.1.a. - the six month time frame is tolled (i.e., suspended) when the citation is issued by the Commissioner, without regard for when the citation is received by the employer;

The purpose of the amendment is to clarify for employers and employees that in order to comply with Va. Code §40.1-49.4.A.3., the Commissioner only need "issue" the violations within six months of the occurrence of any alleged violation, even if the employer receives the citations several days after the end of the six month period. Although a rare occurrence, the VOSH Program has had employers question the application of the statute to such a fact situation.

- b. §260.A.1.b. - the six month time frame begins to run on the day after the incident or event occurred or notice was received by the Commissioner in accordance with Va. Code §§1-210, and the word “month” in the statute means a calendar month in accordance with Va. Code §1-223 (see exceptions noted below);

The purpose of the amendment is to clarify for employers and employees how the six month time frame is calculated by specifically referencing Code of Virginia provisions that apply to computation of time in statutes. Specifically, Va. Code §1-223 provides in part that:

§ 1-210. (Effective October 1, 2005) Computation of time.

- A. When an act of the General Assembly or rule of court requires that an act be performed a prescribed amount of time before a motion or proceeding, the day of such motion or proceeding shall not be counted against the time allowed, but the day on which such act is performed may be counted as part of the time. When an act of the General Assembly or rule of court requires that an act be performed within a prescribed amount of time after any event or judgment, the day on which the event or judgment occurred shall not be counted against the time allowed. (Emphasis added).

Va. Code §1-223 provides as follows:

§ 1-223. (Effective October 1, 2005) Month; year.

“Month” means a calendar month and “year” means a calendar year.

By way of example, if a fatal accident occurred on January 15th and the violation which caused the accident was corrected on the same day, the six month time frame would begin on January 16th, and would end on July 16th.

- c. §260.A.1.c. - notwithstanding §260.A.1.b. above, an alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of

the creating employer, and every day thereafter that it remains uncorrected;

The purpose of the amendment is to clarify for employers and employees that for purposes of calculating the six month time frame for issuing a citation, the date a violation occurred includes not only the first day that it was created, but also every day thereafter that it continues to go uncorrected. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent. (Secretary of Labor v. General Dynamics Corp., Electric Boat Div., Quonset Point Facility, 15 OSHC 2122, 2128 (1993)).

- d. §260.A.1.d. - notwithstanding §260.A.1.b. above, if an employer fails to notify the Commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence, as required by Va. Code §40.1-51.1.D, the six month time frame will begin when the Commissioner receives actual notice of the incident.

The purpose of the amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to a fatal or catastrophic accident as defined in Va. Code §40.1-51.1.D. does not begin until the Commissioner receives actual notice of the accident. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent. The case law is based on the premise that if an employer failed to comply with the notification provisions of the statute, he should not benefit from violating the law by allowing the six month time frame to start running on the day of the accident. (Secretary of Labor v. Yelvington Welding Service, 6 OSHC 2013, 2016 (1978)).

- e. §260.A.1.e. - notwithstanding §260.A.1.b. above, if the Commissioner is first notified of a work-related incident resulting in an injury or illness to an employee(s) through receipt of an Employer's Accident Report (EAR) from the Virginia Workers' Compensation Commission, the six month time frame will commence when the Commissioner actually receives the EAR form;

The purpose of the amendment is to clarify for employers and employees that the six month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of a Employer's Accident Report (EAR) does not begin until the Commissioner receives actual notice of the accident. The amendment reflects a reasonable reading of current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the EAR form. (Secretary of Labor v. Kaspar Electroplating Corp., 16 OSHC 1517 (1993).

- f. §260.A.1.f. - notwithstanding 260.A.1.b. above, if the Commissioner is first notified of a work-related hazard or incident resulting in an injury or illness to an employee(s) through receipt of a complaint or referral, the six month time frame will commence when the Commissioner actually receives the complaint or referral.

The purpose of the amendment is to clarify for employers and employees that the six

month time frame for issuing a citation in response to an inspection that the Commissioner initiated following receipt of complaint or referral does not begin until the Commissioner actually receives the complaint or referral. The amendment reflects current federal Occupational Safety and Health Review Commission legal precedent in that the Commissioner's first opportunity to discover the violation does not occur until receipt of the complaint or referral. (*Secretary of Labor v. Sun Ship, Inc.*, 12 OSHC 1185 (1985)).

- M. Amended §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.F. to codify the Department's multi-employer worksite inspection policy. The language provides that on multi-employer worksites, both construction and non-construction citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer). Additional employers can be cited, whether or not their own employees are exposed, including the employer who actually creates the hazard (the creating employer); the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer - either the general contractor or a prime subcontractor); and the employer who has the responsibility for actually correcting the hazard (the correcting employer). The purpose of the amendment is to codify VOSH's longstanding enforcement policy for the issuance of citations in multi-employer worksite situations.

Section 260.F. now provides:

- F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:
1. The employer who actually creates the hazard (the creating employer);
 2. The employer who is either:
 - a. responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
 - b. responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
 3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

The amendment in § 260.F.2.b., which is different than federal OSHA's multi-employer citation policy, allows VOSH to pursue citations against a prime subcontractor in its roll as a "controlling employer" (e.g. the main framing contractor has subcontracted framing work out to

another subcontractor who creates a hazard, and the main framing subcontractor knew or should have known of the hazard and was responsible by contract or through actual practice for that area of the worksite).

The facts from an actual VOSH accident inspection involving such a business arrangement were related to the Safety and Health Codes Board at its September 15, 2005, meeting when it considered the proposed regulation. The accident involved a truss collapse during the construction of an 8 unit townhouse, and the general contractor had hired a framing subcontractor, who then subcontracted the truss installation to a second subcontractor. The trusses were not braced in accordance with the manufacturer's instructions and they collapsed. After reviewing the specific facts of the case, the VOSH program issued citations related to the accident to the framing subcontractor and its subcontractor, but not to the general contractor.

Facts that are looked at in such a case to determine which companies will receive citations include, but are not limited to: contractual rights and responsibilities, actual work practices on the site, whether the individual employers knew or should have known of the hazard (i.e. employer knowledge), whether employers had provided adequate safety and health programs and trained their employees, whether employers had complied with VOSH standards requiring frequent and regular inspections of the job site; what was the level of technical expertise and experience of the employers involved; how long the hazard was in existence before the accident occurred, etc.

- N. Amended §260, Issuance of Citation and Proposed Penalty, by adding a new subsection 260.G., to codify the Department's multi-employer worksite defense. The language provides that a multi-employer citation issued to an exposing employer shall be vacated if it is determined that:
1. the employer did not create the hazard;
 2. the employer did not have the responsibility or the authority to have the hazard corrected;
 3. the employer did not have the ability to correct or remove the hazard;
 4. the employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees are exposed;
 5. the employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;
 6. where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and
 7. when extreme circumstances justify it, the exposing employer shall have removed his/her employees from the job).

The purpose of the amendment is to codify VOSH's longstanding recognition of a defense to the multi-employer citation policy for a certain class of employers as discussed above. The amendment does not involve any substantive change to VOSH policy or procedure.

- O. Amended § 300.A., Contest Proceedings Applicable to the Commonwealth, by changing "Attorney General" to "Governor" as the individual to whom VOSH will refer contested citations involving the Commonwealth or one of its agencies if the case cannot be settled at the Department level. The purpose of the amendment is to change the decision maker for resolution

of contested state agency VOSH cases from the Attorney General to the Governor. As the Attorney General provides legal support and advice to state agencies, but does not have the authority to issue orders to Executive Branch agencies, it is appropriate to take the Attorney General's Office out of the decision process for VOSH contested cases and give that authority to the Governor, who has such authority.

- P. Amended § 320.G. and I., Extension of Abatement Time to clarify that the Commissioner or his designated representative will be responsible for hearing objections to and appeals concerning extensions of abatement or denials thereof; and clarifying that such decisions will be heard in accordance with the Virginia Administrative Process Act. Neither the rights nor responsibilities of employers or employees are diminished in anyway by the changes. In fact, the rights of both are expanded as the change to §320.I. assures the right of appeal of the Commissioner's decision on a request for an extension of abatement.
- Q. Amended § 340C., D. and E., Settlement, to eliminate references to "amended citations" as the VOSH Program no longer issues amended citations as part of informal or formal settlement agreements. The amendment is primarily procedural in nature and provided for clarification purposes, and does not involve any substantive changes to VOSH

C. Ray Davenport
Commissioner

Attachments: CHANGES I - V: None. Attachments have already been incorporated into the VOSH ARM

Distribution: Commissioner of Labor and Industry
Assistant Commissioner – Programs
VOSH Directors and Managers
VOSH Compliance Staff
Cooperative Programs Director and Manager
Legal Support Staff
VOSH IMIS Staff
OSHA Regional Office, Norfolk
OSHA Regional Administrator, Region III

**Administrative Regulations Manual (ARM) for the Virginia
Occupational Safety and Health Program;
and Corrections**

As adopted by the

Safety and Health Codes Board

Date: April 17, 1995



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: August 1, 1995

Administrative Regulations Manual for the
Virginia Occupational Safety and Health Program

VR 425-02-95

Amendment to the Administrative Regulation for the Virginia Occupational Safety and Health Program by inclusion of Abatement Verification, Final Rule, 29 CFR § 1903.19

As adopted by the
Safety and Health Codes Board

Date: September 29, 1997



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: December 15, 1997

16 VAC 25-60-307, Abatement Verification

When the regulations as set forth in the final rule for Abatement Verification, 29 CFR §1903.19, are applied

to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms or language, shall be considered to read as below:

Federal Terms/Language:

OSHA

Occupational Safety and Health Act of 1970

29 CFR

§1903.16

§1903.19

Assistant Secretary

Agency

May 30, 1997

Occupational Safety and Health
Review Commission

“(b)(2)(ii) For a contested citation item for which the Occupational Safety and Health Review Commission (OSHRC) has issued an order affirming the violation, the later of:
(A) The date identified in the final order for abatement; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
(C) The date established by a formal settlement agreement.

“(b)(4)(ii)(A) The thirtieth day after the date on which a decision or order of a commission administrative law judge has been docketed with the commission, unless a member of the commission has directed review; or...”

“(b)(4)(ii)(B) Where review has been directed, the day after the date on which the issues its decision or

VOSH Equivalent:

VOSH

Virginia Occupational Safety and Health Act

VOSH Standard

§0ARM.0002.03

§0ARM.0007.00

Commissioner of Labor and Industry

Department

December 15, 1997

Virginia Circuit Court

“(b)(2)(ii) For a contested citation item the date established in a formal settlement agreement between VOSH and the employer; **or**
For a contested citation item for which a Virginia Circuit Court has issued an order affirming the violation, the later of:

(A) The date identified in the final order; or
(B) The date computed by adding the period allowed in the citation for the abatement to the final order date;
or
(C) The date established by an agreed order.

“(b)(4)(ii)(A) Date that a formal settlement agreement is signed by VOSH; or...”

“(b)(4)(ii)(B) The thirtieth day after thirtieth the date on which a decision or order

commission pertinent part of a case; or...”

“(b)(4)(ii)(C) That date on which a federal appeals court issues a decision in a case affirming the violation has been stayed.”

of a circuit court judge has been disposing of all or entered;, or...”

“(b)(4)(ii)(C) The date on which the Virginia Court of Appeals issues a final order decision affirming the violation in a VOSH case.”

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the

Safety and Health Codes Board

Date: December 2, 2002



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: March 1, 2003

16 VAC 25-60, *et seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program

16 VAC 25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health Program

As Adopted by the
Safety and Health Codes Board

Date: March 7, 2006



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective Date: September 21, 2006

16 VAC 25-60, *et seq.*, Administrative Regulation
for the Virginia Occupational Safety and Health Program